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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANCISCO CUADRA,

Defendant and Appellant.

B219543

(Los Angeles County  
Super. Ct. No. BA322987)

APPEAL from a judgment of the Superior Court of Los Angeles County, Curtis B. Rappe, Judge. Affirmed as modified.

Lawrence R. Young & Associates, Andy A. Miri and Lawrence R. Young for Defendant and Appellant.

Kamala Harris and Edmund G. Brown, Jr., Attorneys General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec and Joseph P. Lee and Ellen Birnbaum Kehr, Deputy Attorneys General, for Plaintiff and Respondent.

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Francisco Cuadra was convicted following a jury trial of the murder of Johnny Bridges and the attempted murder of Alvin Hare with true findings on related firearm-use and criminal street gang enhancements. He was then convicted after a second jury trial of the attempted murder of three Los Angeles police officers who came to his home to execute arrest and search warrants related to the Bridges-Hare shooting, again with true findings on the related firearm-use and criminal street gang enhancements. On appeal Cuadra contends the evidence was insufficient to support his conviction for the murder of Bridges and attempted murder of Hare, his appointed trial counsel provided constitutionally ineffective assistance by inadequately investigating the case and failing to call him to testify at the second trial, and the testimony of the People's gang expert concerning the predicate acts required to establish the criminal street gang enhancements was impermissibly based on hearsay. Except for a minor correction in the sentence imposed by the trial court (an aggregate state prison term of 187 years to life), we affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

#### *1. The Information and the Motion for Separate Trials*

An information filed on November 30, 2007 jointly charged Cuadra and Jose Martinez with the first degree murder of Johnny Bridges (Pen. Code, § 187, subd. (a))<sup>1</sup> and the attempted willful, deliberate and premeditated murder of Alvin Hare (§§ 664, 187, subd. (a)) on May 4, 2007. The information additionally alleged in connection with each offense that a principal had personally and intentionally discharged a firearm proximately causing the death of Bridges (§ 12022.53, subds. (d), (e)(1)) and that the offenses were committed to benefit a criminal street gang (§ 186.22, subd. (b)).<sup>2</sup>

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<sup>1</sup> Statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> For simplicity on occasion this opinion uses the shorthand phrase “to benefit a criminal street gang” to refer to crimes that, in the statutory language, are committed “for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.” (§ 186.22, subd. (b); see *People v. Jones* (2009) 47 Cal.4th 566, 571, fn. 2.)

In three additional counts the information charged Cuadra alone with the attempted willful, deliberate and premeditated murder of Los Angeles Police Officers Steven Ralph, Edward Rocha and Oscar Gutierrez on May 17, 2007, while those officers were engaged in the performance of their duties, a fact that reasonably should have been known by Cuadra. (§§ 664, subds. (e), (f), 187, subd. (a).) The attempted murder of the three police officers was further specially alleged to have been committed to benefit a criminal street gang and by the intentional discharge of a firearm. Finally, Cuadra was charged in two further counts with being a felon unlawfully in possession of a firearm on May 4, 2007 and May 17, 2007. Those two offenses were also allegedly committed to benefit a criminal street gang.

On October 1, 2008 Martinez moved to be tried separately from Cuadra. The People opposed the motion. On October 10, 2008 the court granted the motion in part and directed trial of the three counts relating to the May 4, 2007 shooting (the murder of Bridges, the attempted murder of Hare and the first felon in unlawful possession of a firearm count) to proceed separately from the trial of the charges involving the May 17, 2007 attempted murder of the police officers.

As the trial involving the May 4, 2007 murder and attempted murder was about to begin in late January 2009, Martinez entered into a negotiated plea agreement with the People. The People then moved to consolidate trial on all counts against Cuadra since the issue of potential prejudice to Martinez from a joint trial on the May 4 and May 17, 2007 charges was now moot. Defense counsel indicated she was not prepared to proceed on the remaining counts involving the May 17 shooting of the police officers. The court accepted that representation, denied the People's request and ordered trial of the charges relating to the police officers to trail completion of the murder case. (During the discussion, the deputy district attorney suggested evidence that Cuadra shot at the police officers when they came to execute the search and arrest warrants was relevant in the murder case to establish consciousness of guilt. The court responded, "That's a different issue.") The first trial then began on January 29, 2009.

## *2. Cuadra's First Trial*

### *a. The People's evidence*

Cuadra was a member of the 38th Street gang, a Latino gang; his gang moniker was Chico. Both 38th Street and AFC, a rival African-American gang, were active in the area where Cuadra's family lived. Elijawan Payne, who was 17 years old at the time of trial, lived across the street from Cuadra.

On April 29, 2007 Payne saw Diondrae Browning, an AFC gang member, on the street. Browning told Payne he had been beaten up by 38th Street gang members and he was going to "get his homeys." Payne then saw Cuadra leave his house and walk to a corner where AFC gang members were gathered. Other Latino gang members had also arrived at the scene in a white car. Cuadra fired a shot, and the rival gang members fired back. More shots were fired when the gang members from the car joined the gun battle. Cuadra was struck in the back of the head by a bullet. When later interviewed by police, Cuadra said he had been shot while standing in front of his house. When he was asked who had shot him, Cuadra became uncooperative.

As Payne walked to school on the morning of May 4, 2007, he saw Bridges selling drugs on a street corner to people arriving by car. Hare was also present in the area selling drugs. Payne then saw Cuadra and Jose Martinez, also a member of the 38th Street gang, who approached him and asked if he was from AFC. Payne said he was not in any gang. Cuadra lifted his sweatshirt and showed Payne a firearm, saying "I got something for the AFCs." Cuadra and Martinez then walked away, toward the location of Bridges and Hare. As Cuadra and Martinez approached Bridges and Hare, with the hoods of their black sweatshirts pulled up, they fired their weapons. Payne said he heard eight or nine gunshots. Bridges fell to the ground; Cuadra and Martinez ran back to Cuadra's house. Payne then saw both men on the porch of Cuadra's house with other people, watching what was going on. Bridges died from two gunshot wounds.

Los Angeles Police Detective Johnny Villa, one of the investigating officers, interviewed Hare after the shooting incident. Hare had not been hit, but his jacket had

several bullet holes in it. At trial Hare testified two Hispanic men shot Bridges while he and Hare were selling drugs. The men had their sweatshirt hoods up, so Hare was unable to see their faces.

Detective Villa also interviewed Payne, who initially denied seeing the shooting. Subsequently, while challenged for not being forthcoming with the police investigators, Payne explained he knew the shooting was gang related and said he was very afraid of the gangs in his neighborhood. In fact, Payne was shot about a month after the Bridges murder. According to Payne, while he was taking out the trash, a car drove by; the driver shouted “Fuck AFC”; and the passenger fired a shot at him. At trial Payne acknowledged that his father had been associated with the AFC gang and had urged him not to testify in the case. Payne himself “hung out” with AFC members in the past, but said he now regretted having done so.

Evidence relating to the criminal street gang enhancements, as well as a possible motive for the shooting, was presented by Los Angeles police officers and gang experts Anthony Saenz and Wayne Caffey. Saenz testified the primary activities of members of the 38th Street gang were murder, attempted murder, carjacking, robbery, home invasions, kidnapping, witness intimidation, criminal threats and drug sales. He added that he had personally served warrants and written warrants for 38th Street gang members for witness intimidation and attempted murder. According to Saenz, certified court records showed convictions of 38th Street gang members Pablo Orrostieta for murder in October 2007 and Larry Mendez for carrying a loaded firearm in June 2007. Saenz knew Cuadra and Martinez as members of the 38th Street gang.

Officer Saenz explained that both 38th Street and AFC, a Blood gang, were active in the same area. The two had a fairly good rapport until 2006 when a 38th Street gang member had been shot and killed by AFC members following a barbecue in a local park. Thereafter, there were violent confrontations between members of the two gangs. According to Saenz, because Bridges was wearing red at the time of the shooting incident, it might have been believed he was affiliated with AFC. Saenz had also

investigated Payne in connection with this case and concluded he was not a member or associate of any street gang.

Officer Caffey testified concerning a letter written in gang vernacular that had been found in the cell of Pablo Orrostieta at Folsom State Prison and that a forensic document examiner had opined was in Cuadra's handwriting. According to Caffey, the slang language used in the letter indicated the author (Cuadra) had been wounded by a bullet and was now looking at life off the streets because he had avenged his shooting.

In the early morning of May 17, 2007 arrest warrants were served simultaneously at the homes of Cuadra and Martinez. According to Detective Villa, when no one responded to the police announcement of their presence at Cuadra's residence, the officers attempted to forcibly open the door with a ram. During the police attempt to enter the home, Cuadra fired shots at the officers through the door.

b. *The defense evidence*

Cuadra testified in his own defense. With regard to the incident in late April 2007 in which he was shot, Cuadra explained his parents were in Nicaragua at the time with his brother. He was cleaning the house when a group of African-Americans came by and called him outside. When he went out, he was attacked. He fought with them and then ran off before he was hurt. However, as he ran, he was shot in the back of the head. Cuadra denied there was a car nearby with 38th Street gang members in it and insisted he did not fire a gun during the confrontation. Cuadra said he was interviewed by the police at the hospital, described what had happened to him, and told the officer, truthfully, he did not know who shot him. After that interview, he was not contacted again by the police about the shooting.

As for the morning of May 4, 2007, Cuadra testified he was using the bathroom in his home when a woman friend told him she had heard gunshots. (Cuadra said he could not remember the woman's name.) Cuadra's older brother, Luis Roa, was also home at the time. Cuadra walked to the backyard and saw nothing. Then he went to the front

where he saw officers and yellow tape. His neighbor, Mary Mendoza, told him to go back inside, which he did.

With respect to May 17, 2007 Cuadra testified he awoke to a commotion in the backyard and someone saying, “No, don’t do it.” He took out his firearm, loaded it and went back to sleep. About 30 minutes later, he heard loud banging at the door. He thought someone had come to shoot him, probably a member of the gang that had previously done so. He grabbed his weapon, went to the front door and fired shots. Before shooting, he did not hear any announcement by police officers. Once he realized the men at the front door were from the Los Angeles Police Department, he stopped firing and told them he would come out. He put the weapon on the floor in his room under some clothes and went outside with his hands up. Cuadra further explained that, because he knew nothing about the shooting of Bridges, he had no idea the police would be at his home to arrest him.

Cuadra denied being a member of a gang. He admitted being a friend of Orrostieta, who he knew was a member of 38th Street, but said his letter to him in prison only contained the lyrics from a Tupac Shakur song that he had modified.

Cuadra’s brother Roa also testified as a defense witness. Roa said he was awakened by gunfire on the morning of May 4, 2007. Cuadra was inside the house with him, and they both went out to the front porch together. According to Roa, Cuadra was wearing boxer shorts at the time. They saw people congregating and a body, but both men then went back inside the house. On the morning of May 17, 2007 Roa heard banging on the front door and then gunshots. He also heard Cuadra say everyone should get down, “the Blacks are trying to shoot at me.” Roa denied hearing the police officers identify themselves before Cuadra fired through the door.

Maricela Mendoza, Cuadra’s next-door neighbor, testified on the morning of May 4, 2007 she heard gunshots. When she looked outside, she saw Cuadra and Roa. Cuadra was wearing only boxer shorts, and he and Mendoza spoke to each other about what was going on. After a few minutes Cuadra went back inside.

*c. The verdict*

The jury found Cuadra guilty of the first degree murder of Bridges, the attempted murder of Hare and unlawful possession of a firearm by a felon; it did not find the attempted murder was committed willfully, deliberately and with premeditation. In connection with the murder and attempted murder counts, the jury also found true the special allegations a principal had personally and intentionally discharged a firearm proximately causing the death of Bridges. Finally, the jury found true the special allegations that all three offenses were committed to benefit a criminal street gang.

*3. Cuadra's Second Trial*

During jury deliberations in Cuadra's first trial the information was amended on the People's motion to add three counts of assault with a firearm on a peace officer (§ 245, subd. (d)(1)) and three counts of attempted voluntary manslaughter (§§ 664, 192, subd. (a)).<sup>3</sup> Cuadra pleaded not guilty to all six new counts. Trial on the charges involving the shooting of the police officers began on February 17, 2009.

Los Angeles Police Officer Steven Ralph testified he and other officers from the Newton Division gang impact team went to arrest Cuadra at 5:00 a.m. on May 17, 2007. Ralph described the officers as dressed in uniform with protective gear. He and Los Angeles Police Officer Eddie Rocha knocked on the security door; Officer Oscar Gutierrez was acting as "cover" nearby. As they knocked, Rocha said loudly, "Los Angeles Police Department. We have a search warrant. Open the door." When no one responded, they knocked and identified themselves a second time and then a third time. The officers started to remove the security door, using a crowbar-type tool and a "hammer" ram. As they were working on the door, multiple shots were fired from inside the house. Officers Ralph, Rocha and Gutierrez moved away from the front door; one of the officers yelled "police" and ordered everyone in the house to come outside. The front door then opened, and Cuadra and his family came out of the house.

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<sup>3</sup> During trial the information was again amended to allege the new offenses were all committed to benefit a criminal street gang.

Once the occupants were outside, the officers entered the house. In the back bedroom they recovered a semiautomatic .45-caliber Glock pistol. A Los Angeles Police Department criminalist confirmed that bullets had been shot into the front door of the residence. He also testified that bullet casings recovered from the back bedroom and kitchen area were fired from the Glock found in the back bedroom.

A number of other officers who were present on May 17, 2007 also testified about the incident, essentially repeating the description of events given by Officer Ralph. Lieutenant Bryan Gilman, the officer in charge of the gang impact team, was present at the scene, as well, and testified the notice given was in conformity with the Los Angeles Police Department's standard procedure. Several neighbors also testified, recanting their earlier statements and now insisting they did not hear the officers identify themselves before hearing the gunfire.

Officer Saenz testified, much as he had at the first trial, about the 38th Street gang and Cuadra's membership in it and also explained that shooting or other violent acts directed at police officers would elevate a gang member's status and respect within the gang. Saenz also testified he had never heard of a gang killing in which gang members invade the home of a rival or kill a rival in his home. He opined a gang killing at 5:00 a.m. at the target's home was highly improbable.

Cuadra did not testify in his own defense in the second trial. Ana Mendoza, the daughter of Cuadra's next-door neighbor, appeared as a defense witness. She testified in late April 2007 she saw Cuadra shot outside his house after he had been attacked by "a couple of Black guys." Cuadra's mother, who had returned from a trip to Nicaragua in the very early morning of May 17, 2007, testified she was awakened by a gunshot, then heard Cuadra yell, "They're coming to kill us," followed by more gunshots. Although she is a light sleeper, she stated she did not hear the police knock or announce themselves before the shots were fired.

The jury found Cuadra guilty of the attempted willful, deliberate and premeditated murder of all three officers and found true the related firearm use and discharge and

criminal street gang enhancements. The jury also found Cuadra guilty of three counts of assault with a semiautomatic firearm upon a three peace officer with true findings on the firearm-use and criminal street gang enhancements. Finally, the jury found Cuadra guilty of unlawful possession of a firearm by a felon in connection with the May 17, 2007 shooting.

#### *4. Substitution of Counsel, the Motion for New Trial and Sentencing*

Following completion of the second trial, Cuadra retained new, private counsel. At counsel's request the sentencing hearing was continued several times to permit him to investigate the case and to prepare a motion for a new trial.

On September 24, 2009 Cuadra moved for a new trial based on the ineffective assistance of his former counsel and newly discovered evidence that pointed to Cuadra's innocence. The motion asserted trial counsel had failed to conduct an adequate investigation or to prepare properly for trial. With the motion Cuadra's new counsel submitted declarations from one witness, Sitlali Mondragon, who claimed she had been with Cuadra inside Cuadra's home from the evening of May 3, 2007 through May 5, 2007, thus Cuadra could not have been involved in the murder of Bridges, and from a second witness, David Mendoza, another neighbor of Cuadra's, who confirmed the testimony of defense witnesses that Cuadra had been outside on his porch in boxer shorts immediately after Bridges was shot and who also declared that all the neighbors were afraid of their homes being invaded by AFC gang members. Cuadra himself also submitted a declaration complaining that his former counsel had not prepared him to testify at his first trial, thus allowing him to remain confused about the timing and sequence of events on the morning of May 4, 2007 and creating conflicts between his testimony and that of other defense witnesses.

Following oral argument on September 25, 2009, the court denied the motion. Moving to sentencing, the court imposed an aggregate state prison term of 187 years to life. For the first degree murder of Bridges Cuadra was sentenced to 25 years to life, plus 25 years to life for the firearm-use enhancement; for the attempted murder of Hare

Cuadra was sentenced to a consecutive term of 7 years, plus 25 years to life for the firearm-use enhancement; for each of the three attempted murders of a police officer in the performance of his or her official duties, he was sentenced to consecutive terms of 15 years to life plus 20 years for the firearm-use enhancement. On each of those three counts the court also directed a minimum parole eligibility date of 15 years pursuant to section 186.22, subdivision (b)(5).<sup>4</sup> Sentence on the two felon-in-possession counts and the three counts of aggravated assault on a peace officer was stayed pursuant to section 654.

## DISCUSSION

### 1. *Substantial Evidence Supports Cuadra’s Convictions for the Murder of Bridges and Attempted Murder of Hare*

To assess a claim of insufficient evidence in a criminal case, “we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we

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<sup>4</sup> Because the jury in the first trial found only that a principal had personally and intentionally discharged a firearm that proximately caused death to Bridges within the meaning of section 12022.53, subdivision (d), not that Cuadra himself had personally fired the weapon, but also found that the crimes were committed to benefit a criminal street gang, the trial court properly imposed the firearm-use enhancement on counts 1 and 2 pursuant to section 12022.53, subdivision (e)(1). As the court recognized, however, imposition of both the firearm-use enhancement and a criminal street gang enhancement is barred by section 12022.53, subdivision (e)(2), unless the defendant personally discharged the firearm. Thus, the court properly declined to impose the gang enhancement on count 2 but, for the same reason, should not have imposed both enhancements on count 1. (See *People v. Brookfield* (2009) 47 Cal.4th 583, 586.) The 15-year minimum parole eligibility date on count 1 imposed pursuant to section 186.22, subdivision (b)(5), is improper and must be stricken. Because the jury in the second trial found that Cuadra had personally discharged the firearm, imposition of both the firearm-use and the criminal street gang enhancements on the three counts of attempted murder of a police officer was proper.

review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] ‘Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]’ [Citation.] A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support”’ the jury’s verdict.” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

Cuadra contends the evidence is insufficient to support his conviction at the first trial for the murder of Bridges and the attempted murder of Hare because Hare could not identify either of the two Hispanic men who shot at him; additionally, Payne, who saw Cuadra with a gun immediately before the shooting (after Cuadra had asked Payne if he was from AFC), saw Cuadra walk off with Martinez toward the location where Bridges was selling drugs and then heard eight or nine gunshots, did not actually see the offenses being committed. Moreover, several witnesses testified they saw Cuadra standing on his front porch wearing only boxer shorts a brief time after the incident. Cuadra challenges as implausible the People’s theory that, if those witnesses were correct, it would only mean Cuadra ran home after shooting Bridges, took off his clothes and came out on the porch with his mother to see what was happening.

Cuadra’s arguments are for a jury, not an appellate court. We recognize our responsibility to ensure the evidence is reasonable, credible and of solid value, but we may not invade the province of the fact finder by reweighing the evidence, reevaluating the credibility of witnesses or substituting our own conclusions for the jury’s findings. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Diaz* (1992) 3 Cal.4th 495, 541.) From Payne’s testimony, as well as the other evidence presented at the first trial, a reasonable fact finder could easily have concluded beyond a reasonable doubt that

Cuadra, even if not the actual shooter, was a principal in the murder of Bridges and the attempted murder of Hare. (See *People v. Richardson* (2008) 43 Cal.4th 959, 1030-1031 [“the testimony of a single witness is sufficient for the proof of any fact”]; *People v. Young* (2005) 34 Cal.4th 1149, 1181 [“unless the testimony is physically impossible or inherently improbable, the testimony of a single witness is sufficient to support a conviction”].) The evidence, therefore, is sufficient to support the convictions.

*2. Cuadra Has Failed To Demonstrate He Received Constitutionally Ineffective Assistance of Counsel*

A defendant claiming ineffective assistance of counsel in violation of his Sixth Amendment right to counsel must show that his or her counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms and also that it is reasonably probable, but for counsel’s failings, the result would have been more favorable to the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *In re Jones* (1996) 13 Cal.4th 552, 561.) “‘The burden of sustaining a charge of inadequate or ineffective representation is upon the defendant. The proof . . . must be a demonstrable reality and not a speculative matter.’” (*People v. Karis* (1988) 46 Cal.3d 612, 656.) There is a presumption the challenged action “‘might be considered sound trial strategy’” under the circumstances. (*Strickland*, at p. 689; accord, *People v. Dennis* (1998) 17 Cal.4th 468, 541.)

On a direct appeal a conviction will be reversed for ineffective assistance of counsel only when the record demonstrates there could have been no rational tactical purpose for counsel’s challenged act or omission. (*People v. Lucas* (1995) 12 Cal.4th 415, 442 [“[r]eviewing courts reverse convictions on direct appeal on the ground of incompetence of counsel only if the record on appeal demonstrates there could be no rational tactical purpose for counsel’s omissions”]; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1058 [“[i]f the record sheds no light on why counsel acted or failed to act in the manner challenged, ‘unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation’ [citation], the contention [that counsel provided ineffective assistance] must be rejected”].)

Cuadra contends his counsel provided ineffective assistance by failing to call him as a witness at the second trial, where he could have repeated his testimony from the first trial that he did not hear the police officers announce themselves before he fired shots at them through his front door, and by inadequately investigating the circumstances of the Bridges-Hare shooting to locate witnesses who could testify about the incident and undermine Payne's testimony, which directly implicated Cuadra. He also argues, due to inadequate investigation and preparataion, his lawyer did not present available evidence that would have established the reasonableness of his fear that his home was being invaded by rival gang members when he shot at the police officers serving the arrest warrant.

Cuadra has failed to demonstrate the necessary elements for any aspect of his ineffective assistance claim. Initially, with respect to possible testimony by Cuadra at the second trial, the record on appeal is inadequate for us to determine whether the decision not to testify was even made upon advice of counsel. The court expressly informed Cuadra, although a defense attorney makes most of the tactical decisions at trial, it was up to him to decide whether or not to testify. Cuadra said he understood the court's comments.

In any event, even if Cuadra was advised by counsel not to testify, it takes little imagination to satisfactorily explain that tactical decision. Cuadra testified in his own defense at the first trial, insisting that he did not shoot Bridges or Hare; the jury did not believe him. It would certainly be rational for his counsel to conclude a second jury would also disbelieve his testimony and to prefer to offer only Cuadra's mother and his neighbor as witnesses to provide the evidentiary basis for arguing Cuadra was afraid he was being attacked by African-American gang members and did not know it was police officers at the door before he shot. Moreover, by keeping Cuadra off the witness stand, the defense was able to present its case without the jury learning that the police officers were seeking to arrest Cuadra for the murder of Bridges and attempted murder of Hare and that Cuadra had, in fact, been convicted of those two violent felonies. (At the first

trial Cuadra had been impeached only with his prior felony convictions for burglary and unlawful possession of a firearm.)

As for his counsel's pretrial investigation, Cuadra argues, as he did in his motion for a new trial, neither his court-appointed lawyer nor her investigator interviewed his girlfriend, who would have given him a complete alibi for the Bridges-Hare shooting, or contacted neighbors who could have established the reasonableness of Cuadra's fear on the morning of May 17, 2007 that his home was being invaded by rival gang members.<sup>5</sup> Notably, however, in his declaration in support of the motion for new trial, Cuadra does not state he told anyone on his defense team the name of the woman who allegedly spoke to him while he was in the bathroom at the time of the Bridges-Hare shooting; and, to the contrary, at trial he testified he could not remember the woman's name. (Cuadra also does not describe this woman in his declaration as his "girlfriend," as his counsel now attempts to portray her.) Without more, on this record we cannot say defense counsel's failure to locate the woman (who, according to her declaration, left Los Angeles on May 5, 2007 to stay with a friend in Bakersfield and "lost contact" with Cuadra) fell below an objective standard of reasonableness under prevailing professional norms. (See *People v. Carter* (2003) 30 Cal.4th 1166, 1211 ["If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.] Otherwise, the claim is more appropriately raised in a petition for writ of habeas corpus."].)

Cuadra's remaining contention is similarly without merit. Testimony from several of Cuadra's neighbors was presented at both the first and second trial (testimony that

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<sup>5</sup> As discussed, Cuadra moved for a new trial based on both newly discovered evidence and ineffective assistance of counsel. Although on appeal Cuadra essentially repeats the argument presented to the trial court regarding his counsel's failure to investigate and thus to discover the alibi witness, Sitlali Mondragon, he has not appealed from the denial of the new trial motion itself.

Cuadra was on his front porch wearing boxer shorts immediately after the Bridges-Hare shooting, as well as a description of the earlier incident in which Cuadra was shot in the head by an AFC gang member). Defense counsel, therefore, necessarily spoke to at least some of those neighbors. Moreover, that Cuadra’s neighborhood was the site of violent confrontations between the rival 38th Street and AFC gangs was undisputed; indeed, it was a central element of the testimony of the People’s gang experts. Testimony was also presented that the houses in the neighborhood had metal gates, and several photographs of the street where Cuadra lived were introduced into evidence. The additional information Cuadra now contends would have established the reasonableness of his fear of a gang invasion on the morning of May 17, 2007 was, at best, cumulative. Defense counsel’s decision not to present that evidence, on this record, appears to be neither unreasonable nor prejudicial.

### *3. The Criminal Street Gang Enhancements Were Supported by Admissible Evidence*

Section 186.22, subdivision (b), establishes alternative or additional penalties for felons whose crimes were committed “for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.”<sup>6</sup> As used in this statute—the Criminal

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<sup>6</sup> Most felonies committed to benefit a criminal street gang are subject to an additional prison term of two, three or four years at the trial court’s discretion. (§ 186.22, subd. (b)(1)(A).) If the underlying crime is a serious felony, the additional term is five years (*id.*, subd. (b)(1)(B)); if the underlying felony is a violent felony, the additional term is 10 years (*id.*, subd. (b)(1)(C)). If the felony committed to benefit a criminal street gang is a home invasion robbery, carjacking, shooting at an inhabited dwelling or vehicle or a violation of section 12022.55, the sentence for the offense itself is “an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of: [¶] (A) The term determined . . . pursuant to [the determinate sentencing law] for the underlying conviction . . . [or] [¶] (B) [i]mprisonment in the state prison for 15 years . . .” (§ 186.22, subd. (b)(4).) If the felony committed to benefit the criminal street gang is punishable by imprisonment for life, the minimum parole eligibility term is 15 years. (*Id.*, subd. (b)(5); see *People v. Jones* (2009) 47 Cal.4th 566, 571, fn. 2; *People v. Lopez* (2005) 34 Cal.4th 1002, 1004, 1011.)

Street Terrorism Enforcement and Prevention Act of 1988 or STEP Act—“‘criminal street gang’ means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated [in portions of section 186.22, subdivision (e)], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.” (§ 186.22, subd. (f).) “Pattern of criminal gang activity,” in turn, is defined to mean “the commission or attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of [the specified] offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions or by two or more persons.” (§ 186.22, subd. (e).)

“Therefore, the ‘criminal street gang’ component of a gang enhancement requires proof of three essential elements: (1) that there be an ‘ongoing’ association involving three or more participants having a ‘common name or common identifying sign or symbol’; (2) that the group has as one of its ‘primary activities’ the commission of one or more specified crimes; and (3) the group’s members either separately or as a group ‘have engaged in a pattern of criminal gang activity.’” (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1222; see *People v. Gardeley* (1996) 14 Cal.4th 605, 617; *In re Alexander L.* (2007) 149 Cal.App.4th 605, 610-611.)

Cuadra challenges only one aspect of the proof presented to support the criminal street gang allegations: He contends Officer Saenz’s testimony that members of the 38th Street gang had engaged in the requisite pattern of criminal activity—that is, had committed two or more “predicate offenses”—constituted inadmissible hearsay and, because not based on Saenz’s personal knowledge, violated his constitutional right to confront witnesses under the Sixth Amendment and *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177], which generally prohibits the use of

testimonial hearsay in criminal prosecutions unless the defendant had a prior opportunity to cross-examine the declarant.<sup>7</sup> However, when Saenz identified certified court records (People’s exhibits 54 and 55) and testified at Cuadra’s first trial that Pablo Orrostieta, who he knew to be a 38th Street gang member with the moniker “Menace,” had been convicted of murder in October 2007 and Larry Mendez, who he knew to be a 38th Street gang member with the moniker “Demon,” had been convicted of carrying a loaded firearm in violation of section 12031 in June 2007—both predicate offenses as defined in section 186.22, subdivision (e)—Cuadra did not object. Accordingly, Cuadra has forfeited his argument this testimony was somehow impermissible. (*People v. Tafoya* (2007) 42 Cal.4th 147, 166 [defendant’s failure to raise confrontation clause claim at trial forfeits issue on appeal]; *People v. Williams* (2008) 43 Cal.4th 584, 620 [““questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal””]; see *People v. Gardeley, supra*, 14 Cal.4th at p. 624, fn. 11; see generally Evid. Code, § 353, subd. (a) [“[a] verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless [¶] . . . [t]here appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion”].)

Even if not forfeited, Cuadra’s argument lacks merit. First, Evidence Code section 452.5, subdivision (b), creates a hearsay exception allowing admission of a certified court

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<sup>7</sup> In *Davis v. Washington* (2006) 547 U.S. 813, 822 [126 S.Ct. 2266, 165 L.Ed.2d 224], without providing an exhaustive classification of all conceivable statements, the United States Supreme Court offered some guidance for determining when statements are testimonial within the meaning of *Crawford v. Washington, supra*, 541 U.S. 36: “Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”

record to prove the commission of the offense reflected in the record: ““An official record of conviction certified in accordance with subdivision (a) of [Evidence Code] Section 1530 is admissible . . . to prove the commission, attempted commission, or solicitation of a criminal offense, prior conviction, service of a prison term, or other act, condition, or event recorded by the record.”” (See *People v. Duran* (2002) 97 Cal.App.4th 1448, 1460 [Evid. Code, § 452.5, subd. (b), “creates a hearsay exception allowing admission of qualifying court record to prove not only the fact of conviction, but also that the offense reflected in the record occurred”]; *People v. Cadogan* (2009) 173 Cal.App.4th 1502, 1515, fn. 4 [same]; see also Evid. Code, § 1280 [hearsay exception for writing made by public employee within scope of employee’s duties under certain specified circumstances indicating trustworthiness].)

Second, a certified court record of a conviction is not “testimonial hearsay” subject to a Confrontation Clause challenge under *Crawford v. Washington*, *supra*, 541 U.S. 36. (*People v. Taulton* (2005) 129 Cal.App.4th 1218, 1225 [Records “prepared to document acts and events relating to convictions and imprisonments . . . are not prepared for the purpose of providing evidence in criminal trials or for determining whether criminal charges should issue. Therefore, these records are beyond the scope of *Crawford* . . . .”]; accord, *People v. Morris* (2008) 166 Cal.App.4th 363, 368 [admission of certified record of convictions proper as nontestimonial hearsay]; see generally *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1209 [the only limit on the admissibility of nontestimonial hearsay is the law of the forum state].)

Finally, although by no means clear from Cuadra’s appellate briefs, the Attorney General suggests Cuadra may be arguing Officer Saenz’s expert testimony was improper because he relied on information from other officers or investigative records to conclude Orrostieta and Mendez were members of the 38th Street gang. However, Saenz testified he knew Orrostieta and Mendez and then responded affirmatively when asked if each was a 38th Street gang member. Nothing in that testimony suggests it was not based on

personal knowledge, and Cuadra’s trial counsel on cross-examination did not question the foundation for it.<sup>8</sup>

In any event, even if Orrostieta and Mendez’s gang membership was a matter of Saenz’s expert opinion, rather than based solely on his personal knowledge, the opinion of a police officer testifying as a gang expert “may . . . be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions.” (*People v. Gardeley, supra*, 14 Cal.4th at p. 618.) “So long as this threshold requirement of reliability is satisfied, even matter that is ordinarily *inadmissible* can form the proper basis for an expert’s opinion testimony.” (*Ibid.*) Specifically, when opining that an individual is a member of a particular gang, the expert may rely, at least in part, on the reports of others more familiar with the individual. (See, e.g., *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1331 [expert’s opinion that defendant was member of King Kobras properly based on report from detective who interviewed defendant, review of booking photographs that showed defendant’s “VKKR” and “KK” tattoos and fact that crime allegedly committed was a primary activity of King Kobras and defendant’s companion was member of King Kobras]; *People v. Thomas, supra*, 130 Cal.App.4th at pp. 1205-1206, 1210 [expert properly based opinion that defendant was member of EYC gang on conversations with other EYC members, conversations with rival gang members, defendant’s tattoos and defendant’s association with known EYC members]; see also *People v. Duran* (2002) 97 Cal.App.4th 1448, 1463, 1464 [“an individual’s membership in a criminal street gang is a proper subject for expert testimony”; “a gang expert may rely upon conversations with gang members, his or her personal investigations of gang-related crimes, and

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<sup>8</sup> At Cuadra’s second trial Officer Saenz again testified that he knew Orrostieta and that Orrostieta was affiliated with the 38th Street gang. When the prosecutor asked Saenz if he knew Orrostieta’s moniker, Cuadra’s counsel objected for lack of foundation. The prosecutor then asked, “How do you know Pablo Orrostieta is a 38th Street gang member?” Saenz answered, “I have had contact with him and other officers in my unit have had contact with him, speaking with him, and he goes by the moniker of Menace.”

information obtained from colleagues and other law enforcement agencies”]; see generally *Thomas*, at p. 1210 [Supreme Court’s decision in *Crawford* “does not undermine the established rule that experts can testify to their opinions on relevant matters, and relate the information and sources upon which they rely in forming those opinions. . . . [T]he material[s] on which the expert bases his or her opinions are not elicited for the truth of their contents; they are examined to assess the weight of the expert’s opinion.”].)

### **DISPOSITION**

The judgment is modified to strike the 15-year minimum parole eligibility term imposed on count 1 pursuant to section 186.22, subdivision (b)(5), and in all other respects is affirmed. The superior court is directed to prepare a corrected abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.